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No. 85-1721

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES DARE SCHAUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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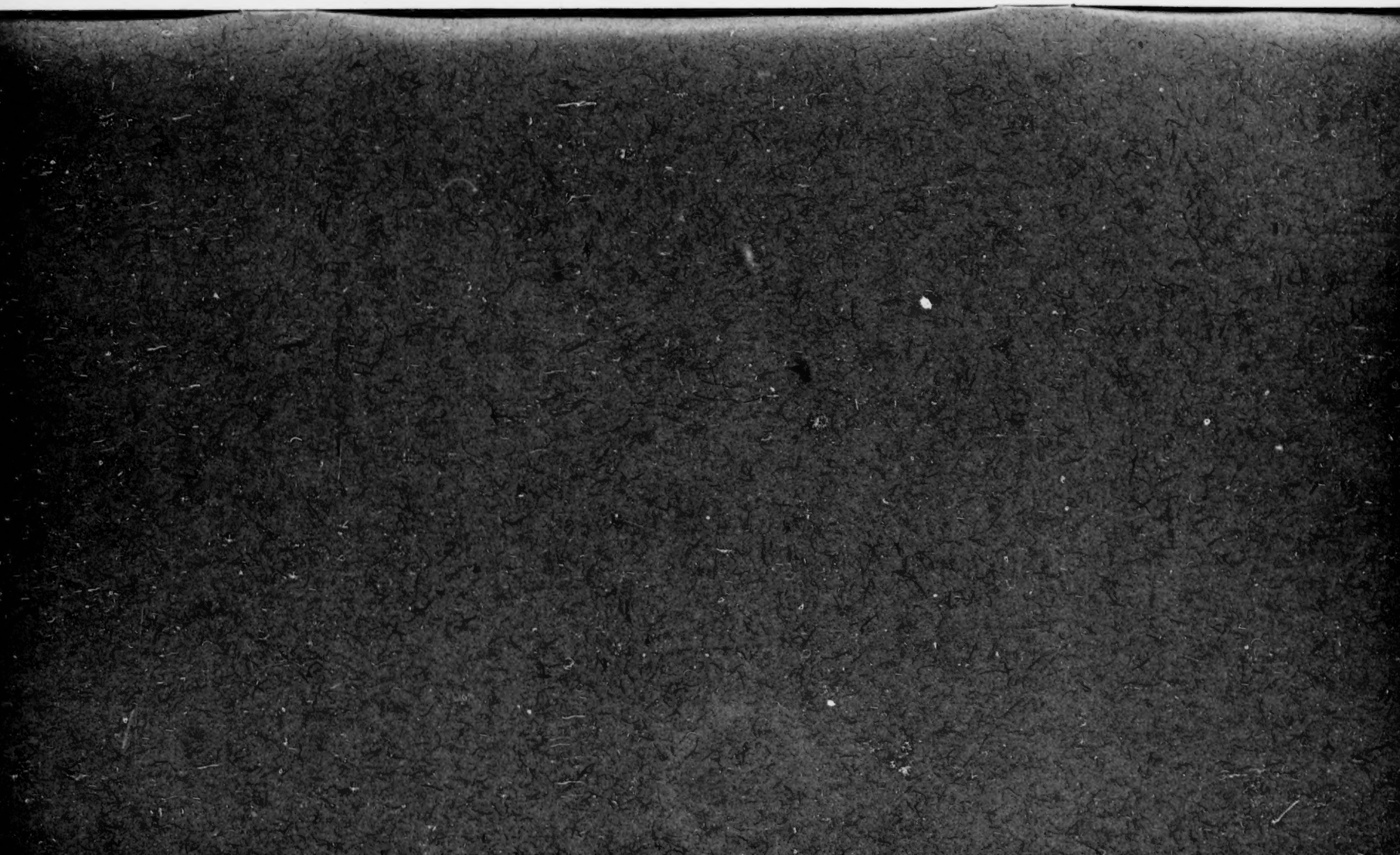

QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the issue of willfulness.

2. Whether the district court adequately instructed the jury on petitioner's theory of defense.

3. Whether the district court abused its discretion in its rulings on the admissibility of evidence and by giving the jury limiting instructions as to certain defense evidence.

4. Whether the court of appeals properly held that the Jencks Act, 18 U.S.C. 3500, did not entitle petitioner to the entire report of an Internal Revenue Service special agent who testified at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. A petition for rehearing was denied on January 29, 1986 (Pet. App. B1). On March 18, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 18, 1986. The petition was filed on April 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on two counts of willfully failing to file income tax returns, in

violation of 26 U.S.C. (Supp. II) 7203, and one count of willfully submitting to his employer a false employee withholding allowance certificate (Form W-4), in violation of 26 U.S.C. (Supp. II) 7205 (Pet. App. A1). He was sentenced to consecutive terms of imprisonment totalling three years and to fines totalling $20,500. Petitioner was also ordered to pay the costs of the prosecution. CR 94.[1] The court of appeals affirmed (Pet. App. A1-A7).

The evidence at trial established that petitioner, a pilot with American Airlines (Pet. 4), had a gross income of $72,210.01 for 1979 and $80,164.81 for 1980, consisting of wages paid by his employer. His employer provided him with wage and tax statements (Forms W-2) reflecting the amounts he had been paid (Tr. 147; GX 3-1). Petitioner filed income tax returns for the years 1966 through 1978, with the exception of 1976, but did not file income tax returns for the prosecution years 1979 and 1980 (Tr. 121-122, 123, 129-130; GXs 1-1, 1-2, 1-3, 2-1). He also failed to file tax returns for the years 1981, 1982, and 1983 (Tr. 124; GX 1-4).

Petitioner received four notices from the Internal Revenue Service (IRS) concerning his failure to file an income tax return for 1979 (Tr. 125-126; GXs 1-5, 1-8). On May 22, 1981, he telephoned the IRS in Chicago in response to a letter from the IRS requesting him to appear for an appointment because he had not filed his 1979 return. Petitioner claimed that he had filed a return in Chicago (Tr. 177-179; GX 19-1).

Evidence at trial also showed that, on May 29, 1981, petitioner filed a withholding certificate (Form W-4) with American Airlines on which he claimed total exemption

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[1]Citations to the record are taken from the government's brief filed in the court of appeals. "CR" references are to docket entries in the Clerk's record.

from income tax withholding (Tr. 149-150; GX 3-3). He certified that he had incurred no income tax liability for the preceding year and that he anticipated no income tax liability for 1981. Evidence introduced by the prosecution showed that, contrary to his representations to his employer, petitioner had incurred a tax liability for 1980 (Tr. 269-271, 274-275).

Petitioner defended on the ground that he had a good faith belief that he was not required to file tax returns. He testified at length about his asserted belief, based on his study of the Constitution, the Diary of the Constitutional Convention of 1787, portions of the Congressional Record, and various court decisions, that his wages were not taxable. Tr. 341-342, 344-346, 358, 360, 362-363.

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with any decision of any other court of appeals or of this Court, and it presents no issue that warrants this Court's review.

1. Petitioner first contends (Pet. 9-12) that the trial court improperly instructed the jury to apply an objective test to determine the willfulness of petitioner's conduct, instead of a subjective test. The subjective test requires the jurors to ascertain a defendant's actual beliefs and intent. See *United States* v. *Phillips*, 775 F.2d 262 (10th Cir. 1985); *United States* v. *Aitken*, 755 F.2d 188, 191-192 (1st Cir. 1985); *United States* v. *Burton*, 737 F.2d 439, 441-443 (5th Cir. 1984). Specifically, petitioner objects to a portion of the trial court's instruction defining "reasonable doubt" and a portion of an instruction requiring an acquittal if petitioner's conduct was found to be the result of a good faith misunderstanding of the requirements of the law. Petitioner's claim is groundless.

The trial court instructed the jury that the reasonable doubt standard allowed "a guilty verdict if, but only if, you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence" (Tr. 913-914). Contrary to petitioner's claim, this instruction in no manner suggested that petitioner's belief that his wages were not taxable had to be objectively reasonable to negate willfulness. The reference to an "ordinary person" referred only to each juror's assessment of the weight of the evidence.

The court's instruction on willfulness (Tr. 917-918), moreover, clearly required the jury to apply a subjective test wholly consistent with *Phillips*, *Aitken*, and *Burton*. The court instructed the jury that "[t]he defendant's conduct is not willful if he acted through negligence, inadvert[e]nce, justifiable excuse or mistake or due to his good faith misunderstanding of the requirements of the law" (Tr. 917). The plain import of that instruction is that the jury must consider petitioner's actual beliefs, not that petitioner's beliefs must be objectively reasonable. The court also instructed the jury that it could consider "the reasonableness of the defendant[']s beliefs in determining whether or not they were held in good faith" (*ibid.*). That instruction, however, did not convert the subjective standard into an objective one. While the instruction permitted the jury to consider the reasonableness of petitioner's asserted beliefs as one factor in determining whether he actually held those beliefs in good faith, the standard remained subjective. The instruction did not require that any good faith or mistake of law on petitioner's part must be objectively reasonable.[2]

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[2]Notably, the instruction at issue here is similar to one given by the court in *Cooley* v. *United States*, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975), which the *Aitken* court considered to be subjective in nature. 755 F.2d at 192.

2. Petitioner next asserts (Pet. 12-14) that the district court improperly rejected jury instructions that set forth petitioner's theory of defense. As the court of appeals pointed out (Pet. App. A7), however, petitioner's "only theory of defense was that he acted under a good faith belief that wages were not income and that he therefore was not required to file income tax returns. The issue of good faith was fairly and adequately covered in the willfulness instruction given by the court." Absent a showing that the rejected instruction was not adequately covered by the instructions given by the court, petitioner's complaint lacks merit and presents no issue warranting the Court's review. See *United States* v. *Park*, 421 U.S. 658, 675 (1975).

3. Petitioner also contends (Pet. 14-19) that the district court abused its discretion in its rulings on the admissibility of evidence and in giving the jury limiting instructions with respect to certain defense evidence. Petitioner argues that the court's rulings and instructions demonstrate that the court applied a "double standard of relevance," admitting prosecution evidence while excluding defense evidence. The court of appeals properly rejected these contentions (Pet. App. A4-A6).

The trial court did not abuse its discretion either in admitting evidence submitted by the prosecution or in excluding certain evidence offered by petitioner. The trial court properly admitted prosecution evidence concerning petitioner's taxpaying history because, as the court of appeals held (Pet. App. A4-A5), that evidence was relevant to petitioner's knowledge, intent, and absence of mistake; it was therefore admissible pursuant to Fed. R. Evid. 404(b). See, *e.g.*, *United States* v. *Farris*, 517 F.2d 226, 229 (7th Cir.), cert. denied, 423 U.S. 892 (1975).[3] As the court of appeals

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[3]Believing, incorrectly, that petitioner had stipulated to the admissibility of evidence of his failure to file state income tax returns for 1979 and 1980, the court of appeals did not address petitioner's objection to

held (Pet. App. A5), the district court was also correct in its rulings excluding certain defense evidence. First, the district court properly excluded books and documents that petitioner claimed he had relied upon in forming his belief that he was not required to file tax returns "because they contained statements of law not within the province of the jury" (*ibid.*). See, *e.g., United States* v. *Burton,* 737 F. 2d at 443-444; *United States* v. *Gleason*, 726 F.2d 385, 388 (8th Cir. 1984); *United States* v. *Kraeger*, 711 F.2d 6, 7-8 (2d Cir. 1983). Second, the court properly exercised its discretion in excluding a series of letters petitioner wrote to the IRS and the Secretary of the Treasury in late 1981 and 1982, on the ground that they were cumulative and therefore excludable pursuant to Fed. R. Evid. 403 (Pet. App. A5). See *Hamling* v. *United States*, 418 U.S. 87, 127 (1974).[4] Third, the court correctly excluded defense testimony concerning letters and conversations between a witness and third parties (Tr. 737-743) and testimony asserting that wages are not income and that the Sixteenth Amendment does not authorize a tax on wages (Tr. 753-779, 784-790). That evidence, as the court held, "involved inadmissible hearsay, was more prejudicial than probative, included legal conclusions beyond the province of the jury, or was irrelevant to [petitioner's] defense of

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that evidence (Pet. App. A4; Pet. 15 n.*). Because, however, the court rejected on the merits petitioner's similar objection to evidence of his failure to file state returns for 1981 through 1983, the court's mistaken reliance on the stipulation was harmless.

[4]Notably, the trial court allowed petitioner to read into the record those materials on which he claimed to have relied; it permitted him to testify as to his understanding of the law; and it instructed the jury on the issue of good faith (Tr. 337, 359-360, 374, 405, 416, 419).

good faith" (Pet. App. A6).[5] Petitioner has failed to show that any of those evidentiary rulings was erroneous, much less that any of them presents an important issue requiring this Court's resolution.

Equally without merit is petitioner's objection (Pet. 7-8, 15) to limiting instructions given by the district court during petitioner's testimony and that of another defense witness. Those instructions properly limited the testimony by excluding legal conclusions and inadmissible hearsay. The instructions also properly advised the jury that the testimony was relevant only to petitioner's intent, and not to the truth of the matters asserted. Contrary to petitioner's claim, the district court never suggested to the jury that the court doubted that petitioner had acted in good faith.

Petitioner also asserts (Pet. 18), without citation of any supporting authority, that the district court erred in permitting the prosecutor to use summary charts during closing argument. That contention, too, lacks merit. It is entirely proper for a trial court to allow the use of charts during argument where, as here, the charts are based on admitted evidence (IRS records and Forms W-2 reflecting petitioner's filing history for the years 1966 through 1978 and petitioner's gross wages in 1979 and 1980). See Fed. R. Evid. 1006; see also *Bower* v. *O'Hara*, 759 F.2d 1117, 1127 (3d

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[5]There is no merit to petitioner's claim (Pet. 7, 15) that the district court imposed a double standard of relevance by allowing the prosecution to introduce evidence of petitioner's conduct both before and after the date of his offenses while not allowing the defense to introduce evidence of certain actions after the date the criminal investigation began. Petitioner has failed to demonstrate that any of the excluded evidence was relevant to his state of mind when he committed his offenses. Except for evidence of similar acts tending to show criminal intent, evidence of a taxpayer's subsequent conduct is generally immaterial to the issue of willfulness. *United States* v. *Ming*, 466 F.2d 1000, 1005 (7th Cir. 1972), cert. denied, 409 U.S. 915 (1972); *United States* v. *Ross*, 626 F.2d 77, 81-82 (9th Cir. 1980).

Cir. 1985); *Bobsee Corp.* v. *United States*, 411 F.2d 231, 240-241 (5th Cir. 1969).

4. Finally, petitioner contends (Pet. 19-20) that the court of appeals erred in determining that petitioner was not entitled under the Jencks Act, 18 U.S.C. 3500, to the entire report of an IRS special agent who testified at trial. One week before trial, the government provided petitioner with a copy of the special agent's report, from which matter unrelated to the agent's expected testimony on direct examination had been excised (Tr. 238). Pursuant to the Jencks Act, petitioner moved for production of the entire report after the agent had completed his testimony on direct examination (Tr. 237-238; see 18 U.S.C. 3500(a)). The government responded that the excised portions of the report did not relate to the agent's direct testimony. As permitted by the Jencks Act, 18 U.S.C. 3500(c), the government then submitted the report to the district court for in camera inspection (Tr. 239). The court denied petitioner's request for additional disclosure of the agent's report on the ground that no exculpatory information had been withheld (Tr. 242). On appeal, the court of appeals held that although the district court appeared to have erroneously limited its review to exculpatory material producible under *Brady* v. *Maryland*, 373 U.S. 83 (1963), any error was harmless because, in the court of appeals' view (Pet. App. A6), "the redacted portions of the report [did not] contain * * * material producible under the Jencks Act."

Petitioner contends (Pet. 19-20) that the court of appeals' ruling conflicts with this Court's pronouncement in *Dennis* v. *United States*, 384 U.S. 855, 875 (1966) (footnote omitted), that "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." See also *Scales* v. *United States*, 367 U.S. 203, 258 (1961). Petitioner, however, misapprehends the import of the court of appeals' ruling. The court of appeals did not

pass on the "useful[ness]" of the excised portion of the report, but rather considered its materiality as a matter of law, a task that is expressly committed to the court in such cases. See 18 U.S.C. 3500(c) ("the court shall excise the portions * * * which do not relate to the subject matter of the testimony of the witness"). In any event, even with regard to alleged exculpatory materials, the court may properly play a role in determining whether particular information is potentially exculpatory, in the course of deciding whether the prosecution must provide the evidence to the defense. See *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). It was therefore entirely proper for the district court and the court of appeals to rule on the materiality of the excluded portions of the special agent's report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

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